IN THE
SUPREME COURT OF MISSOURI

NO. SC86543

RICHARD KUNKEL,

Plaintiff-Appellant,

v.

ANHEUSER-BUSCH, INC., et al.,

Defendants-Respondents.

APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS

Hon. Thomas Grady, Judge

SUBSTITUTE BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

This is an appeal of a wrongful discharge action in the Circuit Court for the City of St. Louis. On September 5, 2003, the trial court granted summary judgment in favor of defendants Anheuser-Busch, Inc. and Anheuser-Busch Companies, Inc. and dismissed plaintiff's action with prejudice.

On October 16, 2003, plaintiff filed a Notice of Appeal. The Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment in an unpublished Memorandum Opinion on November 2, 2004. On January 5, 2005, the Court of Appeals denied plaintiff's request for rehearing and transfer to this Court and on March 1, 2005, this Court granted transfer.

INTRODUCTION

This action emanates from a 1997 reduction-in-force ("RIF") at Anheuser-Busch, Inc. ("A-B") which took place as a consequence of a company-wide cost-cutting mandate.[1] Plaintiff's entire department was eliminated and he was terminated on June 30, 1998. Plaintiff initially sought relief in federal court by filing an action alleging age discrimination. After striking out there, he filed this action based on the "whistleblowing" exception to Missouri's employment-at-will doctrine. Plaintiff alleges that his discharge was not the result of the RIF, but rather of unlawful, retaliatory action taken against him because of complaints he had allegedly made four years earlier regarding suspected wrongdoing by one of A-B's third-party contractors.

Plaintiff's elaborate conspiracy theory is based solely on unsubstantiated conjecture and misstatements of the record. After peeling back the layers, the trial court and the Court of Appeals found that the undisputed record evidence demonstrates that the person who abolished plaintiff's entire department and included plaintiff in the layoff had no knowledge of plaintiff's alleged reports of wrongdoing when he made the layoff decision (L.F. 30).

In short, plaintiff's second bite at the apple in this action does not allow him to get to a jury based only upon speculation and conjecture. There is simply no evidence of **any**

[1] Plaintiff named both Anheuser-Busch, Inc. and its parent company, Anheuser-Busch Companies, Inc., as defendants in this action. Both defendants will be referred to as "A-B."

causal connection between plaintiff's alleged "whistleblowing" and his termination four years later. The trial court properly granted summary judgment.

STATEMENT OF FACTS[2]

Background

Plaintiff Richard Kunkel began working for A-B in 1981 as an Industrial Engineer (L.F. 10). In the early 1990s, he was assigned to the Productivity and Improvement ("PI") Group, which was a stand-alone group in A-B's Administration Division that was divided into two sub-areas, Brewing PI and Operations PI (L.F. 11). As the names suggest, the employees in Brewing PI were primarily responsible for projects relating to Brewing PI, while the employees in Operations PI worked primarily on projects relating to corporate operations (L.F. 18).

Plaintiff was in Brewing PI and reported directly to Ted Luhrs, who in turn reported to John Powell, the Director of the Productivity and Improvement Group. Powell reported to Jim Hoffmeister, the Vice-President in charge of the Administration Division (L.F. 11).

1992-94: The M & R Project

In 1992, Kunkel was assigned to a project involving the consolidation of A-B's merchandising operations in Mt. Vernon, Illinois. At that time, A-B had contracted with

[2] A-B submits its own Statement of Facts because, contrary to Rule 84.04(c), the Statement contained in appellant's brief omits critical facts, misstates evidence, and includes irrelevant facts.

M&R in Mt. Vernon to receive, store, repackage and transport A-B's point-of-sale materials, promotional items, and other similar materials to wholesalers (L.F. 19). M&R stored the materials in 14 warehouses in Mt. Vernon. Plaintiff was assigned the task of monitoring and reviewing M&R's warehouse operations.

On June 10, 1994, Bruce Wilson, M&R's manager, wrote a letter to Terry Floyd in A-B's Merchandising Division advising that Kunkel had made a number of inappropriate comments concerning M&R (L.F. 19, Apdx. 1-2).[3] Floyd forwarded the letter to plaintiff's supervisors, who concluded that Kunkel's relationship with M&R had been seriously compromised and that it was in everyone's best interest to reassign him to another project (L.F. 19). Kunkel therefore left the M&R project and became involved in several other projects during the ensuing years.

The 1997 Reduction-in-Force

Three years after Kunkel left the M&R project, the Productivity and Improvement Group was combined with Packaging Technology and the Research and Development Group to become the Productivity and Technology Department (L.F. 28). Kenn Reynolds, the former Vice-President of the Research and Development Group, was selected to head the new Productivity and Technology Department (L.F. 12). Plaintiff and the other Brewing PI employees continued to report to Luhrs, who then began reporting to Reynolds (L.F. 12).

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[3] A copy of the M&R letter is attached hereto in the Appendix.

A-B had lower-than-expected corporate earnings in 1997 and Reynolds was instructed to reduce costs in his department by approximately $2 million (L.F. 28). In order to comply with this directive, Reynolds had to reduce his workforce by 25% (L.F. 29).

Reynolds first eliminated all vacant positions (L.F. 29). He then eliminated the entire Brewing PI Group, which included plaintiff (L.F. 29). Reynolds completed the RIF by dissolving the financial and capacity planning functions and three additional positions in the Operations PI Group (L.F. 29). Ultimately, Reynolds eliminated his own position and was forced to leave A-B himself (L.F. 29).

After Reynolds disbanded the Brewing PI Group, the Vice-President of Brewing selected four engineers from the group to be reassigned directly to Brewing (L.F. 29). The remaining six engineers in the Brewing PI Group were placed in the Resource Pool, an in-house job transition service that A-B maintains for employees who lose their jobs due to a reorganization or RIF (L.F. 29, 31). In all, nine employees, including plaintiff, were laid off and sent to the Resource Pool.

On November 27, 1997, plaintiff was notified of his layoff and reassignment to the Resource Pool. While in that Pool, plaintiff received his full salary and benefits for six months while he sought employment opportunities both at A-B and outside the company (L.F. 31). On June 30, 1998, four years after his comments about the M&R warehouses, Kunkel's tenure in the Resource Pool expired and he was terminated (L.F. 13).

Plaintiff's Federal Age Discrimination Lawsuit

On February 4, 1999, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that he was discharged on account of his age (L.F. 144). He submitted an affidavit in support of his charge of discrimination in which he stated that his age was the primary factor in his termination: "My job duties were given to a younger person . . . I believe that I have been discriminated against due to my age" (L.F. 144).

On May 27, 1999, Kunkel filed a Complaint in the United States District Court for the Eastern District of Missouri alleging, among other things, that he was selected for layoff on account of his age in violation of the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq*., and the Missouri Human Rights Act, R.S.Mo. 213.010, *et seq*. (L.F. 14). On October 12, 2000, Judge Jean C. Hamilton granted summary judgment in favor of A-B on plaintiff's age discrimination claim (L.F. 14). That decision was affirmed by the United States Court of Appeals for the Eighth Circuit on August 15, 2001 (L.F. 14).

Plaintiff's Whistleblower Lawsuit

On November 15, 2002, over a year after the Eighth Circuit affirmed the summary judgment order, plaintiff filed a petition for wrongful discharge in the Circuit Court of the City of St. Louis. In it, he alleged that he was punished, mistreated, harassed, demoted, and eventually fired for reporting to his supervisors at A-B that he believed that there was asbestos in one of the M&R warehouses and that it had been allowed to collect on some of A-B's merchandise; that M&R employees were discharging certain waste products,

including paint thinner, directly into the sewage system that serviced the M&R warehouses; and that M&R was overcharging A-B for several items and charging A-B for space that did not exist (L.F. 6).

In contrast to these allegations, Kunkel testified as follows:

> "Q: Do you think . . . that at the time the decision was made to pull you from the project, that they were reacting to your reporting of the asbestos, overcharging, and related things?"
>
> "A. **No. No**, if that's what you, no. **They were reacting to this letter** . . . ." (L.F. 65-66, emphasis added).

On September 5, 2003, the trial court granted A-B's motion for summary judgment in an eleven page opinion. The order stated:

> "The Court has carefully scrutinized the summary judgment record in this case. . . . It is apparent to the Court that plaintiff's termination was a part of an overall work force reduction and that the person who made the decision to terminate him had no knowledge of the M&R incident" (A-10).[4]

[4] The opinion of the trial court and the Court of Appeals are reproduced in the Appendix to Appellant's Substitute Brief and will be cited according to the pagination therein.

The trial court further noted that plaintiff's complaints of wrongdoing were not about his employer and that there was a substantial passage of time between his complaints and his selection for layoff (A-10, n. 10).

The Court of Appeals' Opinion

Plaintiff appealed the order of the trial court. The Eastern District Court of Appeals affirmed the trial court's judgment on November 2, 2004 in an unpublished *per curiam* order, pursuant to Rule 84.16(b) (A-12-24). In its memorandum accompanying the order, the court included a lengthy recitation of the facts based on the record (*Id*. at 13-18). To decide the case, the court needed only to address plaintiff's first point on appeal—that the trial court erred because there were material issues of fact as to whether plaintiff's whistleblowing was the cause of his selection for layoff (*Id*. at 21). In addressing this dispositive issue, the court found "the record before this Court does not reflect that Reynolds knew of Kunkel's problems with M&R and his reassignment from that project in 1994" (*Id*. at 21). The court further observed that there was no evidence that the decision-maker singled out plaintiff for placement in the Resource Pool or that he was instructed to select plaintiff for layoff (*Id*. at. 22). Because this issue was determinative, the court addressed the "exclusivity" standard in *dicta*: "Even assuming, *arguendo*, that retaliation for the 1994 whistleblowing was a factor in Kunkel being placed in the Resource Pool, it was not the exclusive cause of his discharge" (*Id*. at 22). The court then stated that it did not need to address plaintiff's other points on appeal (*Id*. at 24).

Plaintiff filed an application for transfer in this Court, raising only the "exclusivity" issue. This Court granted transfer on March 1, 2005.

POINTS RELIED ON

I. THE COURT SHOULD RE-TRANSFER THIS CASE TO THE COURT OF APPEALS BECAUSE A DECISION ON THE SOLE ISSUE RAISED BY THE APPLICATION FOR TRANSFER — WHETHER "WHISTLEBLOWING" MUST BE THE EXCLUSIVE CAUSE OF AN EMPLOYEE'S DISCHARGE — IS NOT NECESSARY TO THE RESOLUTION OF THIS CASE AND WOULD CONSTITUTE DICTA.

Missouri Supreme Court Rule 84.16(b);

Missouri Supreme Court Rule 83.05(b);

Dunn v. Enterprise Rent-A-Car Co., No. ED 83240.

II. THE TRIAL COURT PROPERLY GRANTED A-B's SUMMARY JUDGMENT MOTION BECAUSE PLAINTIFF'S "WHISTLEBLOWING" ACTIVITIES WERE DIRECTED AT M&R WAREHOUSE, INC., A COMPANY THAT WAS NOT PLAINTIFF'S EMPLOYER.

Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. banc 1988);

Bell v. Dynamite Foods, 969 S.W.2d 847 (Mo. App. 1998);

Boyle v. Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. App. 1985);

Saidawi v. Giovanni's Little Place, Inc., 987 S.W.2d 501 (Mo. App. 1999).

III. THE TRIAL COURT PROPERLY GRANTED A-B's SUMMARY JUDGMENT MOTION BECAUSE THERE WAS NO CAUSAL CONNECTION BETWEEN PLAINTIFF'S "WHISTLEBLOWING" ACTIVITIES IN 1994 AND HIS LAYOFF IN 1998.

Williams v. Thomas, 961 S.W.2d 869 (Mo. App. 1998);

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995);

Henderson v. Ford Motor Co., __F.3d___, 2005 WL 850893 (8th Cir. 2005);

O.L. v. R.L., 62 S.W.3d 469 (Mo. App. 2001).

IV. THE EXCLUSIVE CAUSE STANDARD FOR WHISTLEBLOWER CASES IMPOSES A SENSIBLE LIMITATION ON THE JUDICIALLY-CREATED EXCEPTION TO THE AT-WILL DOCTRINE AND IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Lynch v. Blanke Baer and Bowey Krimko, Inc., 901 S.W.2d 147 (Mo. App. 1995);

Dake v. Tuell, 687 S.W.2d 191 (Mo. 1985);

Hansome v. Northwestern Cooperage Co., 679 S.W.2d 273 (Mo. banc. 1984);

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. 1998).

STANDARD OF REVIEW

The trial court's grant of summary judgment is reviewed *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 382 (Mo. banc 1993); *Sigafus v. St. Louis Post-Dispatch, L.L.C.*, 109 S.W.3d 174, 175 (Mo. App. 2003).

ARGUMENT

I. THE COURT SHOULD RE-TRANSFER THIS CASE TO THE COURT OF APPEALS BECAUSE A DECISION ON THE SOLE ISSUE RAISED BY THE APPLICATION FOR TRANSFER —WHETHER "WHISTLEBLOWING" MUST BE THE EXCLUSIVE CAUSE OF AN EMPLOYEE'S DISCHARGE —IS NOT NECESSARY TO THE RESOLUTION OF THIS CASE AND WOULD CONSTITUTE DICTA. (Response to Point I of Appellant's Substitute Brief.)

This case is an inappropriate vehicle for addressing the only issue presented in the Application for Transfer — whether a whistleblowing plaintiff must prove that his whistleblowing activities were the "exclusive" cause of his discharge (*See* App. for Transfer at 3-4). Because any discussion of that issue would be dicta, the basis on which transfer was granted does not exist, and the case should be retransferred to the Court of Appeals.

For the reasons set forth below in Points II and III, it is unnecessary and inappropriate for the Court to reach the "exclusivity" issue because plaintiff's claim founders on at least three threshold grounds: (1) plaintiff's activities did not constitute "whistleblowing" because they did not involve supposedly illegal activities of his employer but, rather, dealt with alleged misdeeds of a third party; (2) the evidence was undisputed that the person who made the decision on plaintiff's layoff, as part of a broad-based reduction in force, was completely unaware of plaintiff's alleged

"whistleblowing"; and (3) there was a fatal temporal chasm of 3½ years between the so-called whistleblowing in June 1994 and plaintiff's notice of layoff in November 1997, thus precluding any causal connection as a matter of law.

Only if the Court were to resolve each of these issues in favor of plaintiff — contrary to all existing authority in each instance — would it be appropriate to decide whether plaintiff need show that the whistleblowing was the "exclusive" cause of his termination. Obviously, if plaintiff did not engage in whistleblowing, or if there was *no* causal connection between plaintiff's activities and his termination, it would be gratuitous to discuss whether, in a hypothetical case, actual whistleblowing must be the only cause. Any such pronouncement in this case would constitute an impermissible advisory opinion.

Plaintiff's 3½ page Application for Transfer raised only the "exclusivity" issue and neglected to apprise the Court of all of the other fundamental defects in his case which make a determination of the "exclusivity" question unnecessary. Consistent with the Court's rules, defendants had no opportunity to point out how and why the issue was not properly presented, and the Court's grant of transfer was thus based on a misperception about the justiciability of that issue in this case.

Although the Court of Appeals' Memorandum did discuss exclusivity, it did so only *arguendo*, and its treatment was therefore *dicta* (A-22). Moreover, the Memorandum "does not constitute a formal opinion of this Court . . . [and] shall not be reported, cited, or otherwise used in unrelated cases before this Court or any other court" (*See* A-13); Rule 84.16(b). Thus, it is not part of the case law of this State, and its re-

examination is not warranted by any of the considerations in Rule 83.05(b).[5] Any discussion of the sole issue raised in the Application for Transfer would be dicta and unnecessary to a decision by this Court. Accordingly, transfer was improvidently granted, and the case should be re-transferred to the Court of Appeals.

II. THE TRIAL COURT PROPERLY GRANTED A-B's SUMMARY JUDGMENT MOTION BECAUSE PLAINTIFF'S "WHISTLEBLOWING" ACTIVITIES WERE DIRECTED AT M&R WAREHOUSE, INC., A COMPANY THAT WAS NOT PLAINTIFF'S EMPLOYER. (Response to Point IV of Appellant's Substitute Brief.)

Missouri adheres to the employment-at-will doctrine. *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. banc 1988). Hence, an employer may discharge an employee for any reason, whether it is a good reason, bad reason or no reason at all. *See, e.g., Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. banc), *cert. denied*, 454 U.S. 1084 (1981). Plaintiff admits that he was an at-will employee (L.F. 339). As such, A-B

[5] The Eastern District evidently does not consider the decision below to be binding, for on April 12, 2005, it reinstated a whistleblowing claim without imposing any requirement that the plaintiff show that the whistleblowing was the exclusive cause of his discharge. *See Dunn v. Enterprise Rent-A-Car Co.*, No. ED 83240.

could terminate his employment at any time with or without cause. *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985).

Nevertheless, plaintiff asserts that his termination is actionable because it falls within the limited so-called "public policy exception" to the employment-at-will doctrine created by the Court of Appeals. *Bell v. Dynamite Foods*, 969 S.W.2d 847, 852 (Mo. App. 1998)("[t]he public policy exception to employment-at-will is a narrow one.").[6] That exception allows employees to seek recovery for wrongful termination if the employee proves that he was terminated in retaliation for: (1) refusing to violate a statute; (2) reporting violations of law by his employer or fellow employees; (3) engaging in actions that public policy would encourage, such as performing jury duty; or (4) filing a workers' compensation claim. *See Luethans v. Washington University*, 894 S.W. 2d 169,

[6] This Court has never endorsed any such public policy exception, and the facts of this case do not afford an appropriate vehicle for addressing the issue because they fall well beyond the outer limits of **any** formulation of the exception adopted by **any** court. Notwithstanding the arguments made by the *amicus curiae*, that issue is not even before this Court. The wisdom *vel non* of adopting such a doctrine has not been briefed by the parties. For these reasons, the Court should await an appropriate case to address this issue and to decide whether its ultimate resolution is a legislative or judicial question. Our discussion of the whistleblower issue in this brief assumes, *arguendo*, that such an exception exists but does not constitute an acknowledgement that it has been, or should be, properly created by judicial fiat.

171 n.2 (Mo. banc 1995). Here, Kunkel asserts that his layoff from A-B falls within the second category—commonly referred to as the "whistleblower exception." *See Mehrer v. Diagnostic Imaging Center, P.C.*, 157 S.W.3d 315, 319 (Mo. App. 2005).

A wrongful discharge action under the public policy exception requires illegal conduct on the part of the **employer**. *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo. App. 1985). The so-called "whisteblower" exception affords protection to those employees who "blow the whistle" on **their employers or fellow employees** to their superiors or to public authorities. *Porter v. Reardon Mach. Co*., 962 S.W.2d 932, 935-36 (Mo. App. 1998)*; Williams v. Thomas,* 961 S.W.2d 869, 873 (Mo. App. 1998)*; Lynch v. Blanke Baer & Bowey Krimko, Inc.*, 901 S.W.2d 147, 150 (Mo. App. 1995); *Lay v. St. Louis Helicopter Airways, Inc.*, 869 S.W.2d 173, 176 (Mo. App. 1993); *Boyle v. Vista Eyewear, Inc*., 700 S.W.2d 859, 873 (Mo. App. 1985). Therefore, to succeed on such a claim, plaintiff must prove that he reported serious misconduct by his employer or a fellow employee. *Lynch*, 901 S.W.2d at 150. It is undisputed that plaintiff did not report misconduct by A-B; rather plaintiff reported suspected wrongdoing by a third-party contractor.

Plaintiff cites no Missouri authority, and A-B knows of none, applying the "whistleblowing exception" to an employee's reporting of suspected violations of law by third parties. The public policy supporting a whistleblowing exception to the at-will doctrine is to protect an employee from retaliation by his employer for reporting its illegal conduct. That purpose is not furthered in any way when the questioned behavior is that of a third party. Application of the exception to the facts of this case would

provide employment security for professional whiners and busy-bodies and would expand the narrow public policy exception well beyond where it has ever gone before.

Kunkel concedes that one of the elements of the public policy exception to the employment-at-will doctrine is that the "reported wrongdoing" must be that of his employer (Br. 19). He argues, though, that his alleged whistleblowing about the activities of M&R satisfies this element because there is a genuine issue of material fact as to whether M&R and A-B are "one and the same business entity" or, alternatively, whether M&R was the agent or servant of A-B (Br. 21).

This argument was advanced for the first time before the Court of Appeals. It is not based on any allegation in the petition and there is absolutely no evidence to support the eleventh-hour claim. In fact, plaintiff admits in his Statement of Facts that "M&R is a corporate entity distinct from Anheuser-Busch" (Br. 6). But Kunkel claims that "M&R basically did whatever [A-B] told it to do" (Br. 6). A review of the record reveals nothing that supports this conclusory statement. Furthermore, even if it were supported by the evidence, it has absolutely no legal significance.

It is undisputed that M&R was never plaintiff's employer (L.F. 6, ¶3), and there is no evidence at all in the record to create a fact issue—material or otherwise—about whether M & R was the alter-ego or agent of A-B. The only conclusion supported by the record is that A-B had a business relationship with M&R (L.F. 107-108). Bruce Wilson testified that M&R is an independent corporation that A-B paid to store its inventory (L.F. 220). The record is devoid of any of the evidence required to justify disregarding the separateness of the two entities. *See Saidawi v. Giovanni's Little Place, Inc.*, 987

S.W.2d 501 (Mo. App. 1999)(corporate form will be disregarded only when corporation is so dominated by a person as to be a mere instrument of that person and indistinct from the person controlling it, if such disregard is necessary to avoid injustice); *Thomas Berkeley Consulting Engineer, Inc. v. Zerman*, 911 S.W.2d 692 (Mo. App. 1995)(must be complete domination of finances, policy, and business practices so that corporate entity has no separate mind, will, or existence).

In an argument apparently unrelated to whether reports of violations of law regarding a third party can be the basis of a wrongful discharge action based on the public policy exception, plaintiff argues that M&R was the agent or servant of A-B "at least with respect to the origination, composition, content and circulation of the damaging June 10, 1994 letter" (Br., p. 35). This unadorned assertion does not breach the evidentiary void that exists in the record and does not create a jury issue about whether M&R was plaintiff's employer.

Plaintiff has failed to demonstrate any genuine issues of material fact regarding whether he "blew the whistle" on **his employer**, and, thus, the trial court properly granted summary judgment on this basis alone.

III. THE TRIAL COURT PROPERLY GRANTED A-B's SUMMARY JUDGMENT MOTION BECAUSE THERE WAS NO CAUSAL CONNECTION BETWEEN PLAINTIFF'S "WHISTLEBLOWING" ACTIVITIES IN 1994 AND HIS LAYOFF IN 1997. (Response to Points II and V of Appellant's Substitute Brief.)

A. The Decision Maker Was Not Aware of Plaintiff's Alleged "Whistleblowing" Activities.

The death knell further sounded on plaintiff's claim when he was unable to present *any* evidence that even suggests the decision-maker regarding his layoff, Kenn Reynolds, knew of Kunkel's reporting activities in 1994. The only evidence presented by either party regarding Reynolds' knowledge is his own testimony:

> "I was also unaware of any alleged reports of illegal or improper activity at M&R Warehouse Inc. In fact, until this litigation, I have never been told by anyone that Mr. Kunkel claims to have made such reports. I was also unaware of and have never seen the letter from Bruce Wilson to Terry Floyd concerning alleged misconduct by Mr. Kunkel"(L.F. 30).

Plaintiff did not proffer any evidence to contradict this testimony. Because of the lack of a causal connection between the events of 1994 and plaintiff's placement in the Resource Pool in 1997 and his subsequent termination, plaintiff's claim fails as a matter of law, regardless of what standard of causation is applied to his claim. *Williams v. Thomas*, 961 S.W.2d 869 (Mo. App. 1998) (no causal connection in wrongful discharge

claim because decision-maker had no knowledge of plaintiff's whistleblowing); *see TRI, Inc. v. Boise Cascade Office Products, Inc.*, 315 F.3d 915, 919 (8th Cir. 2003)(plaintiff's retaliation claim failed for lack of causal connection because decision-makers were not aware of plaintiff's protected activity); *Wolff v. Berkley Inc.*, 938 F.2d 100, 103 (8th Cir. 1991)(a causal link between statutorily-protected activity and an adverse employment action "does not exist if the employer is not aware of the employee's statutorily protected activity."). Absent some proof of a causal connection, both lower courts correctly held that A-B is entitled to judgment as a matter of law.

The 1998 Court of Appeals decision in *Williams v. Thomas* is squarely on point. There the employee - a lab technician/medical assistant - and three others worked for Dr. K. George Thomas. 961 S.W.2d at 870. The plaintiff alleged that she had witnessed certain acts which she believed were Medicare and Medicaid fraud and that she had reported those acts to various public authorities. After she was terminated by Dr. Thomas, she sued him for wrongful discharge, invoking the public policy exception to Missouri's employment-at-will doctrine (*Id*. at 871).

Dr. Thomas moved for summary judgment on the basis that he had no knowledge of plaintiff's alleged whistleblowing at the time he made the decision to terminate her employment. The employee responded by showing that her co-workers were aware of her reports and contended that this evidence created a material issue of fact as to whether Dr. Thomas knew about her alleged whistleblowing. *Id.* at 873.

The court granted Dr. Thomas's motion for summary judgment and held that his affidavit stating that he had no knowledge of plaintiff's alleged whistleblowing at the

time of her discharge was undisputed. *Id*. In rejecting plaintiff's argument that the employee's knowledge could be inferred, the court properly held that a genuine issue of material fact must be real and substantial, not merely spun from conjecture, theory and possibilities. *Id.* at 874. Without **evidence** that the decision-maker knew of the alleged whistleblowing, the plaintiff's claim could not survive summary judgment.

The present case is identical to *Williams*. The evidence is undisputed that when Reynolds included plaintiff in the RIF in 1997, he had no knowledge of plaintiff's alleged reports concerning improprieties at M&R (L.F. 30). Therefore, plaintiff's claim cannot survive and summary judgment was proper.

B. The Trial Court Correctly Held That There Were No Disputed Material Facts Which Prohibited Summary Judgment.

Plaintiff also argued before the trial and appellate courts that he created genuine issues of fact regarding (1) whether Reynolds alone made the decision to eliminate his job, and (2) whether Reynolds knew about plaintiff's actions in 1994. Mischaracterizing the record, plaintiff claims that Hoffmeister and Reynolds jointly made the decision to eliminate plaintiff's position and that Hoffmeister was aware that plaintiff had reported M&R's alleged violations of law in June 1994. Alternatively, plaintiff suggests that even if he failed to create a genuine issue regarding Hoffmeister's participation in the decision to eliminate his position, the person who did make that decision – Reynolds – also knew about the 1994 events. Even assuming that mere knowledge of the alleged whistleblowing would permit him to get to a jury, the record does not support either of plaintiff's assertions.

Plaintiff incorrectly claims that "Hoffmeister, in his deposition, testified that the personnel decisions resulting in plaintiff's 1997 placement in the Resource Pool and eventual termination **were made by Hoffmeister** and Reynolds together" (Br. 27, emphasis added). In support of this statement, he cites Hoffmeister's deposition (Br. 17, citing L.F. 89, 248-49; 252-53). But the trial court and the Court of Appeals correctly perceived that this allegation is not supported by anything in Hoffmeiser's deposition or by any other evidence.

Instead of bolstering plaintiff's argument, the record citations actually refute it. The first two citations are to the same pages of Hoffmeister's deposition where he testified that the RIF was required by senior management and that they decided to look at areas of the company where there was duplication in order to reduce the workforce (L.F. 89-90, 248). Plaintiff's next citation is to Hoffmeister's testimony that he and Reynolds talked about "ideas as to how to minimize" the productivity and technology organization (L.F. 249). Plaintiff's final citation is to Hoffmeister's testimony that, "Kenn Reynolds made the recommendations and the suggestion; I reviewed it and agreed with it" (L.F. 252-53).

At no point in the cited material did Hoffmeister testify that he "made" the decision to include plaintiff in the RIF. In fact, Hoffmeister specifically denied ever discussing any individual employees, stating, "we did it more by groups" (L.F. 249). As

both the trial court and the Court of Appeals observed, the record unequivocally shows that Reynolds alone made the decision.[7]

Plaintiff also claims that "Hoffmeister even suggested that Reynolds may have been involved in the 1994 decision to remove plaintiff from the M&R job" (Br. 18, citing L.F. 252). This contention is wholly spurious and another misrepresentation of the record. The cited material from Hoffmeister's deposition states:

> "Q. Can you tell us whose decision it was to take him off of [the M&R] project?
>
> A. Whoever … was the head of productivity and technology group at the time and that changed over some of those periods, either it was John [Powell] or Kenn Reynolds and I don't remember who."

Plaintiff's effort to turn Hoffmeister's stated **lack of knowledge** into a claim that Reynolds "may have been involved" is disingenuous. Plaintiff knows that in 1994 Reynolds was the Vice-President of Research and Development (L.F. 28) and that he was not even aware of the 1994 events, let alone involved in them (L.F. 30). Indeed, Kunkel's Statement of Facts avers that his supervisor in 1994 was Ted Luhrs and that

[7] Plaintiff presented no evidence that Hoffmeister was Reynolds' superior in A-B's chain of command generally or that Reynolds reported to Hoffmeister specifically on the RIF project. There is thus no evidence in the record creating any genuine issue about the identity of the decisionmaker. The decision was made only by Reynolds.

Luhrs reported to John Powell (Br. 5). The Statement of Facts never even mentions Reynolds as being in the chain of command.

Plaintiff also argues that because some of his job functions were transferred to others after the Brewing PI Group was eliminated and because he was unsuccessful in obtaining a new job with A-B, a fact question exists regarding whether the cost reduction program was used as a "cover" for what plaintiff now speculates is the real reason – retaliation for his actions in 1994. (Br. 28-29).

Plaintiff does not even attempt to present any evidence – because none exists – that anyone involved in the Resource Pool or anyone who reviewed his internal applications had any knowledge regarding the events in 1994.[8] He cites no evidence that he was in fact qualified for any of the jobs he claims he should have received. Instead, he cites to a spreadsheet apparently prepared by him or his counsel showing the jobs with A-B for which he applied after being placed in the Resource Pool (L.F. 318-21). This spreadsheet does not establish that plaintiff was qualified for any of the listed jobs. *See, e.g*., *Hutson v. McDonnell Douglas Corp*., 63 F.3d 771, 780 (8th Cir. 1995)(employee's self-assessment amounts to nothing more than an attack on the business judgment of the employer); *Karazanos v. Navistar Intern. Transp. Corp.,* 948 F.2d 332, 337-38 (7th Cir.

[8] In his federal action, Kunkel claimed that he didn't get any of the jobs because of his age (L.F. 144). The dismissal of his failure-to-rehire claim was affirmed by the Eighth Circuit on the merits, and he is thus precluded from challenging the rehire process on different grounds by the doctrine of *res judicata*.

1991)(employee "must do more than challenge the judgment of his superiors through his own self-interested assertions. . . . The employee's perception of himself. . . is not relevant.").

Plaintiff next cites certain deposition testimony to support his claim that A-B changed a job specification for a job "extremely similar to his old job" to exclude him, but, as usual, neither the cited pages nor any other evidence supports the claim (LF 300-04). Finally, whether some of plaintiff's work was transferred to others is completely consistent with the goals of a RIF and does not create any issue of fact regarding whether plaintiff's inclusion in the RIF more than three years later was caused by the 1994 events. *See, e.g., Bialas v. Greyhound Lines, Inc.*, 59 F.3d 759, 763 (8th Cir. 1995)(in a reduction in force the fact that the plaintiff's duties were assumed by a younger person is not in itself enough to establish age discrimination).

The undisputed evidence establishes that Reynolds alone decided to include plaintiff in the RIF, that he did so solely as part of an effort to reduce costs, and that he did not know about the events of 1994. Thus, plaintiff did not and cannot establish the causal connection necessary to enable him to invoke the narrow exception to the employment-at-will doctrine.

C. The Passage of Time Alone Is Sufficient to Establish the Absence of a Causal Connection.

It is undisputed (a) that plaintiff's purported "whistleblowing" culminated in June 1994, (b) that he was not selected for the RIF until November 1997, and (c) that he was

not discharged until June 1998 (L.F. 6, 16, 170). This 3½ year gap in time, by itself, is enough to vitiate plaintiff's whistleblowing claim. *See Henderson v. Ford Motor Co.*, __F.3d___, 2005 WL 850893 (8th Cir. 2005)("[plaintiff's] protected activities undertaken more than two years prior to the adverse employment action are too separated in time to raise any inference of the requisite causal relationship"); citing *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 685 (8th Cir. 2001)("[T]he seven-month time lapse between the protected activity and the alleged retaliatory act is, without more, too long for the incidents to be temporally—and therefore causally—related.").

Plaintiff claims that various events occurred during this protracted time span that somehow bridge this gap. Apart from plaintiff's wishful speculation and belief, there is simply no evidence to support his theory that all of these events were interrelated. *See, e.g., O.L. v. R.L.*, 62 S.W.3d 469, 481 (Mo. App. 2001) ("[I]nferences must be reasonable; the court need not (and should not) consider those inferences from the facts which are unreasonable. Mere speculation, conjecture, or surmise are insufficient to defeat a motion for summary judgment.").

Most of the "gap" events to which plaintiff cites actually occurred in 1994: the creation and dissemination of a June 1994 letter; A-B's alleged failure to investigate the matters in the letter; A-B's removing plaintiff from the M&R job; and A-B's thereafter assigning him "demeaning and unrewarding work" (Br. 24-26). Plaintiff next alleges that

he received no raises or performance reviews in 1994, 1995 and 1996. Id.[9] He then fast-forwards to the events of 1997 involving the RIF. Id.

Thus, most of plaintiff's "gap" evidence is really a series of complaints about what happened, or did not happen, in 1994. This evidence does not bridge the causal canyon even if it is material. The only complaints involving events that actually occurred *between* 1994 and 1998 are the reviews and raises. But plaintiff presented no evidence that other employees in Brewing PI were given performance reviews during the years in question. *Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (to establish a *prima facie* case, plaintiff must show that similarly situated employees were treated differently). Further, the connection between the lack of performance reviews and the treatment complained of is elusive at best, and plaintiff testified that he never asked the individual responsible for giving him performance reviews why he did not get them (Supp. L.F. 12-13). It is also undisputed that plaintiff did receive performance reviews in 1997, the year he was laid off (Supp. L.F. 26**)**.

[9] Plaintiff does not base any cause of action on these events in 1994 through 1996, nor could he, given Missouri's five-year statute of limitations (R.S.Mo. §516.120) and the fact that he did not bring this case until November 2002. Moreover, the events of which plaintiff complains do not amount to actionable adverse employment action because they did not materially affect a term or condition of his employment. *See, e.g., Rose City Oil Co. v. Missouri Com'n on Human Rights*, 832 S.W.2d 314 (Mo. App. 1992).

As to the raises, the uncontroverted evidence shows that plaintiff was "red-circled" in 1992 when his position changed from Manager Micro Systems Applications to Senior Project Manager (L.F. 103).[10] Indeed, plaintiff admitted at his deposition that he had stopped receiving pay raises two years **before** the June 10, 1994 letter was even written (Supp. L.F. 14-20). Under these circumstances, plaintiff cannot demonstrate that his failure to receive a raise or a review was in any way related to his alleged reports of suspected misconduct at the M&R warehouses. Plaintiff can offer nothing more than his speculation on the issue. When asked about the absence of reviews during 1994 through 1996, he testified:

> "Q. Are you suggesting you were not given performance evaluations because of the letter?
>
> A. That's implied in that. Why else would I not get them?
>
> Q. I don't know. You're suggesting that Anheuser-Busch consciously said we're not going to give you a performance evaluation, because you were pulled from the project?

[10] "Red-circled" is a term used when an employee transfers to a position with a lower pay range but receives no reduction in pay (L.F. 103). The "red-circled" employee maintains his or her then-current salary until such time as it becomes commensurate with the pay range of the new position (L.F. 103).

A. Because of all of the things that came about because of the M&R warehouse; I mean, **that's my thinking** …." (Supp. L.F. 12, emphasis added).

This is precisely the sort of speculation prohibited by Rule 74.04 of the Missouri Rules of Civil Procedure. *See* Rule 74.04 (non-moving party may not rest on mere allegations, but must set forth "specific facts showing that there is a genuine issue for trial"); *see also Barge*, 87 F.3d 256, 259 (8th Cir. 1996) ("Once [defendant] met its burden of demonstrating a lack of genuine issues of material fact, [plaintiff] was required to designate specific facts creating a triable controversy"); *Hutson*, 63 F.3d at 780 (employee's self-assessment is irrelevant). Plaintiff's self-serving musings are not a substitute for real evidence and cannot save his spurious lawsuit.

IV. THE EXCLUSIVE CAUSE STANDARD FOR WHISTLEBLOWER CASES IMPOSES A SENSIBLE LIMITATION ON THE JUDICIALLY-CREATED EXCEPTION TO THE AT-WILL DOCTRINE AND IS CONSISTENT WITH THIS COURT'S PRECEDENT. (Response to Points I and III of Appellant's Substitute Brief.)

For the reason stated in Point I, and as a result of the dispositive arguments made in Points II and III, it is unnecessary for the Court to reach the issue on which it granted transfer — whether plaintiff must establish an exclusive causal connection between his would-be "whistleblowing" activities and the termination of his employment. Suffice it

to say that those courts which have created the whistleblower exception likewise have consistently imposed the exclusivity requirement to prevent the exception from devouring the rule. *Bell v. Dynamite Foods,* 969 S.W.2d 847, 852 (Mo. App. 1998); *Lynch v. Blanke Baer and Bowey Krimko, Inc.,* 901 S.W.2d 147, 150 (Mo. App. 1995); *Clark v. Beverly Enterprises-Missouri, Inc.,* 872 S.W.2d 522, 524 (Mo. App. 1994); *Duncan v. Creve Coeur Fire Protection Dist.,* 802 S.W. 2d 205 (Mo. App. 1991); *Loomstein v. Medicare Pharmacies, Inc.,* 750 S.W.2d 106, 113 (Mo. App. 1988); *see also*, *Brenneke v. Department of Missouri Veterans of Foreign Wars of U.S. of America,* 984 S.W.2d 134, 138 (Mo. App. 1998)(acknowledging the exclusive cause standard but questioning its appropriateness). Unless all these cases — and others — are to be overruled, plaintiff must demonstrate that the "exclusive" cause for his layoff was the events of 1994.

Plaintiff and amicus curiae encourage this Court to broaden the narrow public policy exception to employment-at-will. Kunkel urges that the Court adopt "a primary reason" causation standard (P. Br. 22), and amicus asserts that "contributing factor" is more appropriate (A. C. Br. 16). Even if it reaches the exclusivity issue, this Court should reject their suggestions.

The employment-at-will doctrine is a "long standing legal principle" and is the bedrock of Missouri's employment law. *See Dake v. Tuell,* 687 S.W.2d 191, 193 (Mo. 1985). Employment-at-will is essential to our free market economy and serves the interests of employees and employers by maximizing the freedom of both. Recognizing its importance, this Court has consistently refused to allow tort claims that would erode it. *See, e.g., Johnson v. McDonnell Douglas Corp.,* 745 S.W.2d 661, 663 (Mo. banc

1988)(refusing to recognize a claim for wrongful discharge based on the employer's handbook and refusing to "engraft a so-called 'public policy' exception onto the employment at will doctrine"); *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. 1985)(refusing to recognize a wrongful discharge claim under the guise of *a prima facie* tort); *see also, Amaan v. City of Eureka*, 615 S.W.2d 414, 415 (Mo. banc), *cert. denied*, 454 U.S. 1084 (1981).

Following this Court's guidance, Missouri's appellate courts have also rejected attempts to eviscerate the employment-at-will doctrine. *See, e.g., Bishop v. Shelter Mut. Ins. Co.*, 129 S.W3d 500, 505-506 (Mo. App. 2004)(rejecting claim of wrongful discharge based on implied covenant of good faith and fair dealing); *Hanrahan v. Nashua Corp.*, 752 S.W.2d 878, 883 (Mo. App. 1988)(rejecting claim of wrongful discharge claim based on fraud and tortious interference with business expectancies); *Neighbors v. Kirksville College of Osteopathic Medicine*, 694 S.W.2d 822 (Mo. App. 1985) (rejecting claim of wrongful discharge based on negligent infliction of emotional distress).

When a newly-minted cause of action has the potential to destroy the employment-at-will doctrine, this Court has taken a measured approach to strike the appropriate balance between the rights of employees and employers. *See Hansome v. Northwestern Cooperage Co.*, 679 S.W.2d 273 (Mo. banc 1984). In *Hansome*, this Court acknowledged that the worker's compensation statute was enacted into law against the backdrop of the employment-at-will doctrine. *Id.* at 275, n. 2. In determining the proper balance between the two competing interests, this Court held that the Workers' Compensation Act did not abolish the at-will doctrine but rather provided a limited exception which allows an

action where there was an exclusive causal relationship between the discharge and the employee's exercise of rights under Chapter 287. *Id.* Hence, even though the statute does not expressly so provide, the Court defined the elements of the action created by the statute to require an exclusive causal relationship.

Seven years ago, this exclusive causation standard was challenged before this Court in *Crabtree v. Bugby*, 967 S.W.2d 66 (Mo. 1998). This Court rejected that effort, noting:

> "[This Court] should not lightly disturb its own precedent, and mere disagreement by the current court with the statutory analysis of a predecessor court is not a satisfactory basis for violating the doctrine of stare decisis, at least in the absence of a recurring injustice or absurd results." (*Id.* at 71-72).

Further, the Court noted that abandonment of the exclusivity requirement would allow workers who were fired for tardiness, absenteeism, or incompetence to challenge their discharge in court if they could convince a factfinder that, in addition to other compelling causes, the exercise of their workers' compensation rights was in the mix of factors considered. The Court correctly observed that such a rule would encourage "marginally competent employees to file the most petty claims in order to enjoy the benefits of heightened job security." *Id.* at 72.

The same logic applies here. In creating the public policy exception, the lower courts have sensibly adopted the exclusivity standard applied by this Court to workers' compensation retaliation cases in *Hansome* and recently reaffirmed in *Crabtree.* This

requirement maintains an appropriate balance between the employment-at-will doctrine and any public-policy exception. There is no reason to distinguish between retaliation for reporting a worker's compensation claim and one for an employer's misconduct. To do so would create an inherent inconsistency and chip away at the Court's precedent.

The wisdom of an exclusivity requirement is graphically depicted by the facts of this very case. Plaintiff's seemingly interminable crusade against A-B began with a claim that his layoff was based on his age. In his verified EEOC charge, Kunkel said he was "discriminated against due to my age, 53" (L.F. 144). In his deposition, he expressly disclaimed the very theory he now espouses:

> "Q: Do you think . . . that at the time the decision was made to pull you from the project, that they were reacting to your reporting of the asbestos, overcharging, and related things?"
>
> "A. **No. No**, if that's what you, no. **They were reacting to this letter** . . . ." (L.F. 65-66, emphasis added).

Having been rebuffed on his age-discrimination theory, Kunkel has now completely reversed his field and embraced the very version of his discharge that he previously denied. Principles of judicial estoppel should foreclose such antics; at the very least, the exclusivity requirement should prevent a plaintiff who has previously charged one kind of retaliation from taking a second bite of the apple based on a different alleged motivation.

Plaintiff's fondness for implausible inferences also illustrates how vast is the hole he would poke in the at-will doctrine. If retaliation for whistleblowing need be only "a

reason" or "a factor" in the discharge calculus, plaintiff and his ilk can be counted on to argue that *mere awareness* by the employer of the whistleblowing will justify an inference that it was "a reason" or "a factor" in the decision, thus making a submissible case. If so, verdicts pegged on speculation will abound.

A-B has been forced to defend this baseless case for six years, even though plaintiff's own testimony shows he does not believe he was laid off for alleged whistleblowing. Abandonment of the exclusivity requirement would work a substantial injustice in this case, as in many others. The Court's fear of "petty claims" as expressed in *Crabtree*, is well taken, and it should decline to adopt the standard urged by plaintiff and amicus.

CONCLUSION

Based upon the foregoing, A-B respectfully submits that the case should be retransferred to the Court of Appeals or, alternatively, that the trial court's judgment be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06
AND LOCAL RULE 360

The undersigned certifies that the foregoing Brief of Respondents includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06 and Local Rule 360. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in the Brief of Respondents is 8,444, exclusive of the cover, signature block and certificate of service and compliance.

The undersigned further certifies that the disk filed with the Brief of Respondents was scanned for viruses and was found virus-free through the McAfee Virus Scan anti-virus program.

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